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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARIE CHELLINO Plaintiff, vs. KAISER FOUNDATION HEALTH PLAN, Inc a corporation; DOES 1 through 10, inclusive, Defendants.	NO. C07-3019 CRB PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT Date: March 28, 2008 Time: 10:00 a.m. Courtroom 8 Judge Charles R. Breyer

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INTRODUCTION

The plaintiff was employed by the Kaiser Foundation as a computer programmer. She became disabled because of severe fibromyalgia on June 27, 1996. Kaiser, at all times relevant, had a disability plan for its employees insured by AETNA Life Insurance Company. The plaintiff had been receiving disability benefits under the plan until Aetna terminated them on August 31, 2006.

To justify terminating the benefits, Aetna relied on a tortured interpretation of a medical opinion that it knew to be false and an incorrect definition of "sedentary work." Further, Aetna denied the plaintiff the full and fair review mandated by ERISA. This case is the poster child case for bad faith and the classic picture of an arbitrary and capricious decision.

THE FACTS OF THE CLAIM

Ms. Chellino was found by the plan to be totally disabled because of fibromyalgia from June 27, 1996. 1025. She was granted disability benefits and a waiver of life insurance premiums because of her disability. 1017. On September 25, 2000, Ms. Chellino was awarded Social Security Disability benefits. 629.

It appears that Aetna took over the claim from the original insurer of the plan shortly after Ms. Chellino started to receive benefits. Sometime in 2000, Aetna appears to have made a first attempt to terminate the plaintiff's disability benefits. 677. Ms. Chellino hired an attorney and the benefits were eventually reinstated. 663.

In October 2002, Aetna sent a nurse to interview Ms. Chellino at her home. The nurse wrote that disability seemed to be long-term and significant with little prospect for improvement. 747. The plaintiff was described as underweight and malnourished. Ms. Chellino told the interviewer that she enjoys spending time at a stable with a friend's horse; that she rides the horse a maximum of 20 minutes; and that she "tries to walk for twenty minutes once or twice a day and is usually

able to tolerate this." 755.

On July 21, 2003, the plaintiff filled out an Aetna claim form in which she wrote, "I keep my hands/arms supported in my pockets." 36.

On August 5, 2003, the plaintiff's treating doctor, Dr. David Padgett, wrote that Ms. Chellino was totally disabled. He diagnosed her with fibromyalgia, repetitive-strain syndrome and possible thoracic outlet syndrome. 62. Dr. Padgett was interviewed by a doctor from Aetna in September 2003. He told the Aetna doctor that Ms. Chellino "gets out of the house periodically and is able to go to the stable to visit her horse. Recently she did some very limited riding." 58. On May 11, 2004, video taped surveillance of the plaintiff revealed her riding a horse. The plaintiff was also videotaped on May 12 and 15. 18.

On June 16, 2004, the plaintiff, in answering an Aetna questionnaire, said that her daily activities consisted of driving 15 minutes to a stable where she walks alternatively with a horse or a friend for exercise and to socialize with people. 189, 193.

On July 22, 2004, Aetna sent copies of the video surveillance to Dr. Padgett for his comments. 713. Dr. Padgett pointed out that the video did not show that the plaintiff wears wrist braces and a sacroiliac belt and at nighttime she is at home resting with a headmaster collar. 225. Aetna also received the notes of Ms. Chellino's physical therapist. Those notes pointed out that she rides a "quite old and calm" horse for about 15-20 minutes at a time. Further, "She is able to carry 1-2# only and holds items against chest, rarely holds things in hands or by handles." Both her ability to stand and sit were very limited. She is able to drive 15-20 minutes at a time because of a supportive seat and pillows in her car. 229-30.

Medical records obtained by Aetna on February 9, 2005, show that Ms. Chellino was taking narcotic pain medication. 254, 293.

Aetna had Ms. Chellino surveilled again on April 17, 18, and 19, 2005. She

was filmed leading two horses by ropes, driving a motor vehicle, carrying an empty plastic bucket against her chest, wearing wrist braces and, at times, a neck collar. 3.

On June 22, 2005, Ms. Chellino was examined by Dr. Krames, hired by Aetna to perform an independent medical evaluation. He noted, "She enjoys horseback riding and at the direction of he physician and physical therapist, she has been instructed to visit her horse barn daily, which is a 15 to 20 minute drive. She rides approximately 15-20 minutes at a time. 330. He concluded, based upon his review of the medical records given to him by Aetna and his one hour examination of the plaintiff, "This patient has not only fibromyalgia but also a history of pituitary adenoma, which may also cause her fatigue and limits this woman's ability to perform tasks of daily living or be employed in any occupation." 337.

The entire medical file, the videos and the Krames report were then given to Dr. Rick Snyder, an Aetna employee, to review. Dr. Snyder never personally met, spoke with, or examined the plaintiff or her treating doctors. The totality of his knowledge about her is based on what Aetna provided to him for review. He recognized that Dr. Padgett and Ms. Chellino's physical therapist were of the opinion that she was totally disabled. He noted that Dr. Padgett wrote that Ms. Chellino "cannot remain sitting or standing at a computer long enough to accomplish work. He reports that she needs rest breaks and indicates that medications slow her cognitive process. . . . Her medications are refilled to include . . . Norco 10 mg." Dr. Snyder concluded with regard to Dr. Krames report, "Based on the medical data in the file and with a reasonable degree of medical certainty the physical examination findings from the independent medical examination do not support the claimant is impaired to a less than sedentary capacity." 402-3.

Unhappy with his report, Aetna sent Dr. Krames the videos to review. The

transmittal letter made Aetna's position clear to Dr. Krames. "[R]ecent surveillance reveals Ms. Chellino's physical activity appears to be greater than your assessment at the time of the IME. . . . After review of the surveillance video, would your opinion change regarding Ms. Chellino's capacity?" 410. The administrative record shows that Aetna was fairly confident that Dr. Krames would change his opinion. An internal Aetna note states, "Based on past experience, the surveillance could definitely cause Dr. Krames to re-think his opinion." 1334-35. Yet, it appears that Dr. Krames was not going to change his opinion for nothing. He asked for $2100 to review the video, an amount that Aetna described as "excessive." In the end, Aetna was willing to pay the excessive fee for the right result. 1338, 1341.

On February 15, 2006, Dr. Krames wrote his second report. After reviewing the video, Dr. Krames noted that Ms. Chellino was able to drive a car, was able to shop for herself, and she was able to get on and off a horse. 436. But that was all known to him when he wrote his first report, the report that found Ms. Chellino to be totally disabled; Dr. Krames knew, from his interview with Ms. Chellino and his review of the medical records that Aetna had given him, that the plaintiff rode a horse regularly, walked 20 minutes a day, drove 15 to 20 minutes at a time, and did light shopping. So what was in the video that caused him to change his mind?

The videos do indeed show Ms. Chellino shopping. We see her after she has left a grocery store with her purchases in a shopping cart being pushed by a box boy. The box boy unloads the cart and puts the purchases into the car. 1582 @ 1:24 p.m. This hardly supplements the doctor's knowledge of Ms. Chellino's activities in a direction away from disability. The videos indeed show Ms. Chellino driving her car, a fact known to Dr. Krames when he wrote the first report. The videos show nothing spectacular about Ms. Chellino's driving. As for riding the horse, there are extremes of horse back riding. There is the riding done in a rodeo or by a jousting knight. Surely that level of horse riding would not

support a disability claim. There has to be another extreme of horseback riding that would not rule out disability because Dr. Krames knew about Ms. Chellino's horse riding when he wrote the first report finding her to be totally disabled. Try to picture that level of horseback riding. Mounting the horse would be a very easy act. The video shows Ms. Chellino mounting the horse from a platform. 1583 @ 5:33 p.m. Other than being lifted onto the horse by a crane, can an easier method of mounting a horse be imagined? Riding the horse, at the disabled extreme, would be very gentle. The video shows the horse, with Ms. Chellino on its back, traveling about 50 feet at the slowest possible speed and then stopping to commune with another horse for a minute or two. 1583 @ 5:35 p.m.

Dr. Krames made some remarkable statements in his second report about Ms. Chellino that are not supported by the surveillance videos. He wrote that she was able to lift relatively heavy objects. Such activity does not appear in the videos. He said that she was able to push and pull at will. There is no pushing or pulling requiring significant force in the videos. He found that she could do fine manual manipulation with very little evidence of manual manipulation at all and in spite of her wearing wrist braces bilaterally. He wrote that the videos show no signs of pain behavior yet noted that Ms. Chellino walked with both hands in her pockets, wrist braces on both arms and, at one time, a neck brace. He knew, or should have known from his review of the Aetna records at the time of the first report, that Ms. Chellino walked with her hands in her pockets to support her hands and arms. The videos do not show extended periods of sitting or standing and Dr. Krames made no mention of the plaintiff's ability to sit or stand. The Ninth Circuit recently wrote in Blau v. Astue No. 05-35891 (9th Cir. Nov. 8, 2007) quoting Fair v. Bowen 260 F.3d 1044, 1049-50 (9th Cir. 2001), "Daily household chores and grocery shopping are not activities that are easily transferable to a work environment, 'where it might be impossible to periodically rest or take medication.'"

In the end Dr. Krames concluded "It is my opinion that she should be able to be employed in an occupation that calls for her to do fine manipulation and to hold object up to 5 pounds." 440.

On March 13, 2006, Dr. Rick Snyder again reviewed the file. He suggested that there should be additional surveillance and a functional capacity evaluation (FCE). 459. An FCE was set up. 462. The FCE was found to be inconclusive because of the plaintiff's complaints of pain. 847.

An Aetna internal note dated June 13, 2006 summarized the situation. **"Multiple internal medical reviews, two IME's and an FCE have not yielded sufficient information to alter the decision to continue paying benefits. Thus, it is unlikely that additional surveillance would be useful at this time."** 1389.

On July 6, 2006, an Aetna employee of unknown name and qualifications found jobs that a person with Ms. Chellino's background and education could perform for a reasonable wage if the person had sedentary work ability. 1391-95. As will be shown below, there was absolutely no evidence that Ms. Chellino had sedentary work ability.

On August 31, 2006, Aetna sent Ms. Chellino a letter terminating her disability benefits effective August 16. 2006. 841. The letter noted that Ms. Chellino was surveilled "driving, shopping, walking a horse, riding a horse, walking around a neighborhood, standing and interacting with others." Not a single one of the activities, alone or together, are incompatible with disability, a fact recognized by Dr. Krames in his first report, Dr. Padgett, the plaintiff's physical therapist, and the anonymous claims person that reviewed the file on June 13, 2006. 1389. The letter continued explaining that Dr. Krames changed his mind about the plaintiff after viewing the videos. As pointed out above and as the trier of fact will see, the videos are innocuous. Aetna then pointed out that an FCE was performed with invalid results. The invalid FCE was incredibly interpreted to mean that the plaintiff had greater work ability than the medical

records and the videos indicated. According to Aetna, if the claimant is able to perform the tasks of an FCE he is not disabled; if he is unable to perform the tasks, he is faking. Aetna's medical consultants, the letter said, concluded that Ms. Chellino could perform sedentary work on a full time basis. The medical consultants that reached the conclusion were not identified and there does not appear to be any document in the administrative record authored by a doctor stating that Ms. Chellino can perform sedentary work. Even if there were such a document, there is no evidence in the administrative record that supports such a conclusion. The letter concludes by identifying the sedentary jobs that could be performed by someone with Ms. Chellino's background and education and a sedentary work capacity.

The termination of benefits was administratively appealed on November 14, 2006. 532. The appeal asked Aetna to forward a copy of the complete claim file.

When the file was reviewed by me, I noted that Dr. Krames was employed for the IME by an organization named NCM. I asked Aetna about its prior experience with NCM and Dr. Krames. 797. Aetna refused to give any information. 886. Aetna was asked twice again about its prior reliance on the two. 541, 550. Aetna finally replied that "we do not believe that prior medical reviews conducted on other disability claims by Dr. Krames has any relevance to our determination of the facts and circumstances surrounding Ms. Chellino's disability claim." 796. The Ninth Circuit has decided otherwise. See Abatie v. Alta Health 458 F.3d 955, 969 (9th Cir. 2006). The evidence in the administrative record strongly suggests that Dr. Krames is a doctor that Aetna knew it could rely on to come to the opinion that Aetna was looking for. 1334.

As part of the administrative appeal, the plaintiff sent Aetna reports from rheumatologist Dr. Rajiv Dixit. He examined her on November 28, 2006 and found that she was totally disabled and suffering from "longstanding and widespread severe pain" resulting from fibromyalgia. She also had cognitive

dysfunction. "Her pain requires narcotic analgesia." 546.

Part of the administrative record that Aetna sent to me consisted of a CD Rom disk with what was supposed to be the surveillance videos. The disk is filed concurrently with this Motion For Summary Judgment and marked as Exhibit 1585. Missing from the video was the content of disk 1583, including the sequence showing Ms. Chellino riding a horse. This was not discovered by me until the official administrative record was sent to me after the denial of the administrative appeal and the beginning of litigation. Not knowing that I had been given an incomplete version of the surveillance videos, I sent what I had to Dr. Dixit for review. He wrote, "There is absolutely nothing on the video that would lead me to believe that the patient is not disabled from her fibromyalgia. Patients with fibromyalgia are able to ambulate normally and are able to do certain activities of daily living especially when they are having a good day. Patients with fibromyalgia typically have periods of exacerbation and remission and it is not unusual that during a period of relative remission, the patients are able to do some activities of daily living." 549.

Aetna was also sent a letter from Dr. Padgett in which he described Ms. Chellino's condition one day after undergoing the FCE. "She was having a significant flair in her pain. She was showing neural irritation from her neck to/through he sacrum that greatly reduced function." 801. Ms. Chellino's physical therapist saw her on May 1, 2006, 4 days after the FCE. He reported that "she presented with increased symptoms to a severe degree." 803.

Aetna had the claim reviewed by a Dr. Alan Marks, no stranger to the courts. His no disability opinions were rejected in Soron v. Liberty Life 2005 WL 1173076 (N.D.N.Y.) and Plummer v. Hartford 2007 U.S. Dist. LEXIS 488 (S.D. Ohio). On February 19, 2007, he wrote his report. He never examined Ms. Chellino. He relied heavily on the video surveillance and the reports of Dr. Krames. He concluded that "Any person who can care for a horse, lead a horse

on walks, and mount and ride a horse, cannot in any reasonable way be thought of as being disabled from work." 893. Thus, even though he claims to have relied on the reports of Dr. Krames, he obviously disagreed with him. Furthermore, while the videos and the medical records can support a finding of Ms. Chellino walking, mounting and riding a horse, there is no evidence that she "cared" for a horse.

On February 27, 2007, Aetna denied the administrative appeal. 881. Aetna relied on the opinion of Dr. Marks. Surveillance, Aetna wrote, showed Ms. Chellino "driving, shopping, walking a horse, riding a horse, walking around a neighborhood, standing and interacting with others. These activities are in contradiction to her inability to perform a sedentary occupation." 882. Surely Dr. Krames would disagree. Aetna's conclusion that Ms. Chellino could perform a sedentary occupation developed out of nothing at all.

In reaching its decision, Aetna ignored the plaintiff's cognitive dysfunction described by Dr. Dixit; ignored the plaintiff's reliance for pain control on narcotic medications; ignored the fact that the FCE was, as Aetna admitted, "invalid" (882); ignored the contradiction between the opinions of its own Drs. Krames and Marks as to whether or not walking a horse, riding a horse, walking, driving, shopping, and talking to other people preclude disability; ignored case law brought to its attention that an FCE is a poor vehicle for testing disability caused by fibromyalgia (Stup v. UNUM 390 F.3d 301 (4th Cir. 2004), Dorsey v. Provident 167 F.Supp.2d 846 (ED Penn 2001), Pollock v. Citibank 308 F.3d 880 (8th Cir. 2002), Byrom v. Delta 343 F.Supp.2d 1163 (N.D. Ga 2004)) (556); ignored literature in its administrative record that points out that FCE's are completely unreliable for a number of reasons including lack of research, lack of protocol, lack of uniform criteria, lack of standardization, lack of any ability to project what a person could perform in an 8 hour day, significant safety deficiencies, nearly no peer-reviewed journal articles regarding reliability, and, very significant to this

case, cannot tell whether the failure of a person to participate in a task indicates malingering or a physical inability to perform the task. The tester could unilaterally conclude, the article points out, without any valid reliable basis, that the patient is not putting out maximal effort. 582.

The termination of plaintiff's benefits was arbitrary and capricious and wrong.

LEGAL DISCUSSION

The standard of review to be employed by the court in this ERISA benefits case is the arbitrary and capricious standard of review as modified by Abatie v. Alta Health. 909-10. The Ninth Circuit decided in Abatie v. Alta Health, supra, that when discretion is granted to a claims administrator so that review of a denial of benefits would be for abuse of discretion in the District Court, that review would, generally, remain an abuse of discretion review even if there were serious conflicts of interest affecting the decision maker. This does not mean that the conflict of interest would be ignored. To the contrary, the degree of deference given by the court to a fiduciary's decision will take into account the nature, extent and effect of any conflict of interest and the impact that conflict may have had on the decision. The more egregious the evidence of conflict of interest is, the less deference will be given to the fiduciary's decision. The level of skepticism with which a court reviews a conflicted administrator's decision may be low if a structural conflict is unaccompanied by evidence of malice, self-dealing, or a "parsimonious claims-granting" history. On the other hand, a court should weigh a conflict more heavily if the administrator gave inconsistent reasons for a claim's denial, failed to adequately investigate or ask a claimant for necessary evidence, failed to credit reliable evidence, or has a history of denials due to incorrect interpretations of plan terms or decisions against the weight of evidence in the record.

We begin our examination of Aetna's conflict of interest by noting that it

is both the claims fiduciary, with the power to determine who gets benefits and how much, and the entity that has to pay the benefits. "[P]laintiff's will have the benefit of an abuse of discretion review that always considers the inherent conflict when a plan administrator is also the fiduciary, even in the absence of 'smoking gun' evidence of conflict." Abatie, 969. Thus, even if there were no evidence of Aetna's inherent conflict of interest affecting its decision, the court must apply a modified, less deferential, abuse of discretion review in judging Aetna's decision.

Applying the Abatie conflict of interest analysis to the present case produces a plethora of facts that should effect the court's view of the situation.

First we have a denial of a full and fair review. 29 USC 1133(2). Aetna failed to send the plaintiff all of the surveillance videos until after the administrative appeal was denied and refused to tell the plaintiff of its prior connection with Dr. Krames. Filed concurrently with this brief is the disc represented by defendant to be the surveillance films of the plaintiff.

Second we have the defendant relying on the opinion of Dr. Marks, who never met the plaintiff and whose opinion that walking, driving, shopping, talking, walking a horse and riding a horse is per se evidence of no disability contradicts the opinion of Dr. Krames, upon whose opinion Dr. Marks claims to rely. See Salley v. DuPont 966 F.2d 1011, 1015 (5th Cir. 1992) where the court held that it was arbitrary and capricious to deny ERISA benefits based on the opinions of non-examining doctors who contradicted the opinion of treating doctors when the entire knowledge of the non-examining doctors regarding the patient came from the records of the treating doctors. In Pinto v. Reliance Standard 240 F.3d 840 (3d Cir. 2000) the court held that the cherry picking of a treating doctor's findings and the rejection of his pro-disability conclusion was evidence of conflict of interest affecting the standard of review. Further, in relying on Dr. Marks' opinion, Aetna failed to come to terms with the fact that Marks' opinion is also based on the

plaintiff's performance on the FCE, a test that Aetna itself found to be "invalid."

Third, we have the defendant rejecting the opinions of treating doctors. In Donaho v. FMC 74 Fed.3d 894, 901 (8th Cir. 1996) the denial of benefits was found to be arbitrary and capricious when the only evidence supporting the decision was the report of a reviewing physician, who never examined the claimant, where all of the treating doctors opined total disability. "While this fact alone is not dispositive, it lessens the weight which the committee should have accorded [the reviewing doctor's] opinion. . . . Certainly where the reviewing physician's conclusions are contradicted by an examining physician and two treating physicians, reliance on the reviewing physician's conclusions 'seems especially misplaced' and constitutes an abuse of discretion. . . . In prior cases, we have held that where there is a conflict of opinion, the plan administrator does not abuse his discretion in finding that the employee is not disabled. However, where the administrative decision lacks support in the record, or where the evidence in support of the decision does not ring true and is so overwhelmed by contrary evidence, the administrative decision is unreasonable and will not stand. That is the case here."

Next, Aetna ignored the decision to grant Ms. Chellino Social Security benefits (Ladd v. ITT 148 F.3d 753 (7th Cir. 1998)), the plaintiff's cognitive problems (Hines v. Unum 110 F.Supp.2d 458, 466 (W.D. Va 2000)), and her use of narcotic analgesics (Smith v. Continental Casualty 450 F.3d 253, 264 (6th Cir. 2006)). These facts tend to show that Aetna failed to credit the plaintiff's reliable evidence, failed to follow ERISA regulations, and made a decision contrary to the weight of the evidence.

Abatie, 969, describes the court's function when doing a conflict of interest analysis as "something akin to a credibility determination about the insurance company's or plan administrator's reason for denying coverage under a particular plan and a particular set of medical records." Plaintiff suggests that under the

facts of this case, terminating the plaintiff's disability benefits had more to do with Aetna's desire to save its money than Aetna's belief that she was able to work. The termination of benefits was an abuse of discretion.

Even if there were no Abatie decision and this case were to be decided with a pure arbitrary and capricious standard of review, the defendant should be found to have abused its discretion. The plaintiff's benefits were terminated because Aetna claimed that she could perform a sedentary occupation. There is no evidence that the plaintiff can perform a sedentary occupation. No doctor ever opined that she could and if one did, he did so only by ignoring the definition of the term "sedentary." "Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 CFR §404.1567(a). Dr. Krames, in his second report limited the plaintiff's ability to carry to 5 pounds. There is no evidence at all contradicting the opinion of the plaintiff's physical therapist that she is limited to 15-20 minutes of sitting in a good seat where she is able to shift and reposition and "Even with rest she can not total a functional amount of sitting for work related activities and cannot sit an hour a day more than 2-3 days per week." 229. If the plaintiff cannot lift more than 5 pounds and if she cannot sit for most of an eight hour work day, she cannot, by definition, perform sedentary work. A termination of benefits that is not supported by substantial evidence is an abuse of discretion. Snow v. Standard 87 F.3d 327 (9th Cir. 1996).

CONCLUSION

The plaintiff's benefit from the Plan is $2475 per month minus what she received per month initially for Social Security. Thus she is entitled to $1366.02 per month and a waiver of the premiums on her life insurance. She is entitled to recover all arrears owed plus interest and attorney fees.

Respectfully submitted,

Charles J. Fleishman